

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC**

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In the Matter of )

CG Docket No. 02-278

Precise Payroll, LLC, For Retroactive  
Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) )

CG Docket No. 05-338

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**PETITION OF PRECISE PAYROLL, LLC FOR  
RETROACTIVE WAIVER OF 47 C.F.R. § 64.1200(A)(4)(IV)**

Pursuant to Section 1.3 of the rules of the Federal Communications Commission (the “FCC” or “Commission”),<sup>1</sup> Precise Payroll, LLC (“Precise Payroll” or “Petitioner”) requests a retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) (the “Opt-out Requirement”) with respect to solicited facsimiles providing information regarding Precise Payroll’s services sent with the recipients’ prior invitation or permission in 2012 (the “2012 Faxes”).<sup>2</sup> The Commission has granted more than 150 retroactive waivers to similarly-situated parties.<sup>3</sup> Precise Payroll respectfully asks for the same relief.

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<sup>1</sup> 47 C.F.R. § 1.3.

<sup>2</sup> These issues regarding “on whose behalf” the 2012 faxes were sent, and the identity of the “sender” under 47 C.F.R. § 64.1200(f)(10), are under consideration by the United States District Court for the Eastern District of Pennsylvania in a pending lawsuit, *Goebel Insurance Agency, Inc., Pennsylvania Corporation, individually and as the representative of a class of similarly-situated persons v. Precise Payroll, LLC and John Does 1-5*, Civil Action No. 16-cv-16-4775.

<sup>3</sup> *Rules And Regulations Implementing The Telephone Consumer Protection Act Of 1991; Junk Fax Prevention Act of 2005; Application For Review Filed By Anda, Inc.; Petitions For Declaratory Ruling, Waiver, And/Or Rulemaking Regarding Fax Opt-Out Requirements*, CG Docket Nos. 02-278, 05-338, Order, 29 FCC Rcd 13998 (2014) (“2014 Anda Commission Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. Section 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 8598 (2015) (“August 2015 Order”); *Petitions for Declaratory Ruling and Retroactive Waiver of 47 C.F.R. § 64.1200(a)(4)(iv) Regarding the Commission’s Opt-Out Notice Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, CG Docket Nos. 02-278, 05-338, Order, 30 FCC Rcd 14057 (2015) (“December 2015 Order”).

## I. BACKGROUND ON THE OPT-OUT REGULATION

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of a fax machine to send unsolicited advertisements, subject to certain exceptions.<sup>4</sup> “Unsolicited advertisement” is defined to mean “material advertising. . . any property, goods, or services which is transmitted to any person *without that person’s prior express invitation or permission* . . . .”<sup>5</sup> In 2005, Congress enacted the Junk Fax Prevention Act, which requires the sender of an unsolicited fax advertisement to provide specific information that would allow recipients to ‘opt-out’ of any future fax transmissions from the sender.<sup>6</sup>

In implementing the Junk Fax Prevention Act, the Commission imposed an opt-out notice requirement on *solicited* fax advertisements by adopting the Opt-out Requirement, which states that fax advertisements “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice.”<sup>7</sup> This requirement seemingly contradicted the plain wording of the statute, the application of which is limited to *unsolicited* advertisements. In addition, the order adopting the opt-out requirement (the “*Junk Fax Order*”) included a footnote that stated “the opt-out

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<sup>4</sup> 47 U.S.C. § 227(b)(1)(C).

<sup>5</sup> 47 U.S.C. § 227(a)(5) (emphasis added).

<sup>6</sup> 47 U.S.C. § 227(b)(1)(C)(iii), (b)(2)(D).

<sup>7</sup> See 47 C.F.R. § 64.1200(a)(4)(iv); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278, 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787, App. A (2006) (“*Junk Fax Order*”).

notice requirement only applies to communications that constitute *unsolicited* advertisements.”<sup>8</sup> This apparent conflict led to considerable confusion in the industry.

In the *2014 Anda Commission Order*, the Commission recognized that due to the contradictory footnote in the *Junk Fax Order*, some parties that had sent fax advertisements with the recipients’ prior invitation or permission may have reasonably been uncertain about whether the Opt-out Requirement applied to them.<sup>9</sup> The Commission thus granted a retroactive waiver of the Opt-out Requirement to certain petitioners facing lawsuits premised, in part, on the failure to include opt-out language in faxes sent with prior invitation or permission.<sup>10</sup> The *2014 Anda Commission Order* further afforded those similarly-situated to the petitioners therein an opportunity to request retroactive waiver and encouraged parties to file such requests within six months of the release date, *i.e.*, April 30, 2015. However, this date *was not fixed* and allowed for waivers to be granted after that date. The Consumer and Governmental Affairs Bureau (the “Bureau”) has in fact granted waivers filed after that date.<sup>11</sup>

Notably, in the *December 2015 Order*, the Bureau granted relief to parties filing waiver requests through September 21, 2015. The Bureau declined to reject the petitions solely on the basis that they were filed after the six-month filing date referenced in the *2014 Anda Commission Order*. The Bureau noted that all five of the petitions sought waiver for faxes sent prior to the April 30, 2015 deadline imposed by

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<sup>8</sup> *Id.* at 3810, fn.154 (emphasis added).

<sup>9</sup> *2014 Anda Commission Order* at ¶¶ 24-26.

<sup>10</sup> *Id.* at ¶¶ 1, 26-27.

<sup>11</sup> *Id.* at ¶ 2.

the *2014 Anda Commission Order* and concluded that “granting waivers to the five parties here does not contradict the purpose or intent of the initial waiver order because these parties are similarly-situated to the initial waiver recipients.”<sup>12</sup>

Since the *2014 Anda Commission Order*, the Commission has granted over 150 retroactive waivers of the Opt-out Requirements to parties that have asserted in waiver requests that (i) the subject faxes were sent without compliant opt-out provisions to recipients who had previously provided permission or invitation to receive them and (ii) that such faxes should not be subject to TCPA liability because there was industry-wide confusion caused by the seemingly contradictory statements contained in a footnote in the *Junk Fax Order* and the Opt-out Requirement.<sup>13</sup>

## **II. FACTS PERTINENT TO PRECISE PAYROLL**

Precise Payroll is a small business located in Warminster, Pennsylvania, a suburb of Philadelphia. Precise Payroll’s business services are focused on payroll processing, direct deposit processing, tax filing and other related processes.<sup>14</sup> Its clients are other small and mid-sized businesses, primarily in the Philadelphia area.

In 2012, its owner talked on the telephone with a representative of Goebel Insurance Agency, Inc. (“Goebel Insurance”) regarding Precise Payroll’s business services. Precise Payroll did not at that time—and to this day does not—engage in unsolicited direct marketing, whether by facsimile, telephone, email or otherwise.

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<sup>12</sup> *December 2015 Order* at ¶ 18.

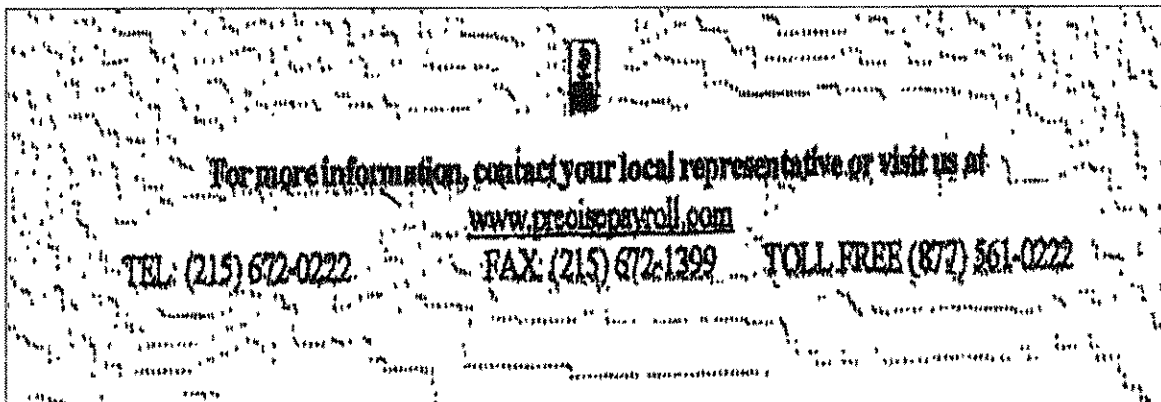
<sup>13</sup> *December 2015 Order* at ¶¶ 8, 13 fn. 55.

<sup>14</sup> Some of these other business processes include: check signing & stuffing; 401k calculations and reports; labor distribution; general ledger preparation; vacation/sick accruals; employee wage detail reports; accountant reports; new hire reporting; vendor checks; background screening; pre-employment screening; and, drug testing.

Typically, potential customers would learn about Precise Payroll from referrals from others and through Precise Payroll's internet presence. The potential customer would then contact Precise Payroll directly, usually by telephone.

During such telephone calls, Precise Payroll would discuss its services with the potential customer. For a brief period in 2012, Precise Payroll would sometimes ask the potential customer if they wanted to receive some follow-up information by fax, and if the customer responded in the affirmative, Precise Payroll would ask for the potential customer's fax number. Precise Payroll would only send the follow-up fax if the potential customer indeed indicated they wanted to receive such a fax. Precise Payroll estimates that it sent about 100 faxes during this period.

Precise Payroll included its local telephone number, its toll-free telephone number and its fax number in the faxes that it sent, including the fax that it sent to Goebel Insurance. This information appeared on the bottom of the one-page fax, as reproduced below:



Recipients of these faxes could thus contact Precise Payroll directly, including to confirm they did not want to receive any further faxes. Moreover, it was Precise Payroll's business practice to only send one fax to any particular potential customer.

This is precisely how the statute should operate: Precise Payroll understood that it had obtained a ***one-time consent to send one fax***. It never sent a second fax to any particular recipient. Why then would it need to include opt-out language regarding a second (or third, fourth, fifth, etc.) fax that it never intended to send?

On September 2, 2016, Goebel Insurance filed a lawsuit against Precise Payroll on behalf of itself and as a putative representative of a proposed class of similarly-situated persons in the United States District Court for the Eastern District of Pennsylvania (the “Court”) titled *Goebel Insurance Agency, Inc. a Pennsylvania corporation, individually and as the representative of a class of similarly-situated persons v. Precise Payroll, LLC and John Does 1-5* (Case No. 2:16-cv-04475) (the “Federal Lawsuit” or “the *Goebel Insurance v. Precise Payroll* Case”).

In the Federal Lawsuit, Goebel Insurance alleges that Precise Payroll is liable under the TCPA for, among other things, sending facsimile advertisements that did not display the proper opt-out language. In the Federal Lawsuit, Goebel Insurance seeks class certification for “[a]ll persons who (1) on or after four years prior to the filing of this action, (2) were sent telephone facsimile messages of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of Defendants, and (3) from which [Precise Payroll] did not have prior express invitation or permission, or (4) which did not display a proper opt-out notice.”

Goebel Insurance further alleges that the faxes at issue constitute an advertisement and that the faxes did not contain compliant opt-out notices. Goebel Insurance therefore claims that Precise Payroll is precluded from asserting any prior

express permission or invitation from the recipients of the faxes because the transmitted faxes did not include a complete opt-out notice.

To be clear, through this petition Precise Payroll does not request that the Commission resolve the factual or legal questions raised in the pending Federal lawsuit that Goebel Insurance has filed against Precise Payroll, including whether any particular recipient provided prior express permission. Precise Payroll understands that such issues remain within the jurisdiction of the trial court. As the Bureau indicated in the *December 2015 Order*, “the granting of a waiver does not confirm or deny that the petitioners had the prior express permission of the recipients to send the faxes. That remains a question for triers of fact in the private litigation.”<sup>15</sup> Rather, what Precise Payroll seeks is the same relief afforded to over 150 petitioners in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

### **III. GOOD CAUSE EXISTS TO GRANT PRECISE PAYROLL A RETROACTIVE WAIVER**

Pursuant to 47 C.F.R. § 1.3, the Commission may waive any provision of its rules for “good cause shown.” Specifically, a waiver may be granted if: “(1) special circumstances warrant deviation from the general rule and (2) the waiver would better serve the public interest than would application of the rule.”<sup>16</sup> The Commission should grant Petitioner the requested waiver for the same reasons that waivers were granted in the *2014 Anda Commission Order*, *August 2015 Order*, and *December 2015 Order*.

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<sup>15</sup> *December 2015 Order* at ¶ 16.

<sup>16</sup> *2014 Anda Commission Order* at ¶ 23

First, special circumstances warrant deviation from the general rule. As the Commission and the Bureau recognized in those prior decisions, the *Junk Fax Order* “caused confusion or misplaced confidence” as to whether the opt-out requirement applied to solicited fax advertisements because it stated that the “opt-out notice requirement only applies to communications that constitute unsolicited advertisements.”<sup>17</sup> In addition, the Commission’s notice of intent to adopt § 64.1200(a)(4)(iv) likewise “did not make explicit that the Commission contemplated an opt-out requirement on fax advertisements sent with prior express permission of the recipient” thereby further contributing to the confusion or misplaced confidence about the opt-out notice requirement.<sup>18</sup>

As in the Commission’s and the Bureau’s prior orders regarding retroactive waiver of the Opt-out Requirement, the confusion caused by the inconsistent statement in the *Junk Fax Order* and the lack of explicit notice warrants deviation from the Opt-out Requirement and supports granting a retroactive waiver here.<sup>19</sup>

Second, granting the requested waiver would serve the public interest. Like the petitioners granted retroactive waivers of the Opt-out Requirement in previous Commission and Bureau orders, Precise Payroll faces potentially significant class action litigation on the basis of the purported non-compliant opt-out information from fax recipients who provided prior invitation or permission to receive the 2012 Faxes. In the *2014 Anda Commission Order*, the Commission noted that “confusion or misplaced

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<sup>17</sup> *Id.* at ¶ 24.

<sup>18</sup> *Id.* at ¶ 25.

<sup>19</sup> *See, December 2015 Order* at ¶ 13.



confidence ... left some businesses potentially subject to significant damage awards under the TCPA's private right of action," and the "TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests."<sup>20</sup> Based on these circumstances, the Commission concluded that, on balance, the public interest was served by "grant[ing] a retroactive waiver to ensure that any such confusion did not result in inadvertent violations of this requirement while retaining the protections afforded by the rule going forward."<sup>21</sup> The same public interest supports granting Precise Payroll a waiver in this case.

#### **IV. THE FCC HAS AUTHORITY TO WAIVE REGULATIONS AND EXERCISING THIS AUTHORITY DOES NOT VIOLATE THE SEPARATION OF POWERS**

Certain commenters in similar proceedings have argued that the TCPA creates a private right of action to sue for "a violation of this subsection of the regulations provided under this subsection" and gives the FCC no power to "waive" that right. This argument has been taken up by the FCC and been decided in favor of prior petitioners similarly situated to Precise Payroll. In its most recent November 2, 2016 Order, the FCC decided, in pertinent part:

For the reasons discussed we find that the public interest is better served by granting limited retroactive waivers. At the outset, we dismiss arguments that granting waivers while litigation is pending violates the separation of powers, as one commenter has suggested. As the Commission has previously noted, by addressing requests for declaratory ruling and/or waiver, we are interpreting and implementing a statute, the TCPA, over which Congress provided the Commission authority as the expert agency. Likewise, the mere fact that the TCPA allows for private rights of action to enforce rule violations does not undercut the

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<sup>20</sup> 2014 *Anda Commission Order* at ¶ 27.

<sup>21</sup> *Id.*

Commission's authority, as the expert agency, to define the scope of when and how its rules apply.

The Commission may waive its rules for good cause shown. A waiver may be granted if: (1) special circumstances warrant a deviation from the general rule and (2) the waiver would better serve the public interest than would strict application of the rule. The Commission previously found that special circumstances warranted deviation from the general rule at issue here. Specifically, the Commission found two reasons for confusion or misplaced confidence among affected parties that the opt-out notice rule did not apply to fax ads sent with recipient consent: (1) inconsistency between a Junk Fax Order footnote and the rule, and (2) the notice provided prior to the rule, even though legally sufficient, did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.

See FCC November 2, 2016, Order DA 16-1242, at p. 8-9.

In the instant Petition, Precise Payroll has demonstrated that it is similarly situated to prior waiver recipients, and that the FCC has authority to grant such waivers. Therefore, Precise Payroll requests a limited retroactive waiver for fax ads sent with recipients' prior express consent or permission prior to April 30, 2015.

**V. THE FCC HAS DECLINED TO REJECT PETITIONS SOLELY ON THE BASIS THAT THEY WERE FILED AFTER APRIL 30, 2015**

Precise Payroll anticipates that Goebel Insurance, who is the plaintiff in a TCPA putative class action against Precise Payroll, will oppose the instant Petition and, *inter alia*, argue that it is untimely. However, the FCC has rejected this same argument in both its *December 2015 Order* and *November 2016 Order*. In those orders, the FCC noted that opponents of these petitions for waiver often argue that petitions are untimely because they were filed after April 30, 2015. See *December 2015 Order* at ¶ 15, and *November 2016 Order* at ¶18. In rejecting prior commenters arguments, the FCC declined "to reject petitions solely on the basis that they were filed after April 30, 2015."

*Id.* The FCC noted that the petitions “sought waiver for faxes sent prior to the April 30, 2015 deadline,” which was the same relief afforded to the original petitioners, making the later filed petitions, including Precise Payroll’s, still “similarly situated” to the initial waiver recipients. See December 2015 Order and November 2016 Order.

As such, granting the waiver requested by Precise Payroll does not contradict the purpose or intent of the initial waiver order because Precise Payroll is similarly situated to the initial waiver recipients. Therefore, Precise Payroll respectfully requests a limited retroactive waiver for fax ads sent with recipients’ prior express consent or permission prior to April 30, 2015.

#### **VI. PRECISE PAYROLL’S PETITION MAKES NO ADMISSION OF IGNORANCE OF LAW**

Precise Payroll acknowledges a small number of previous petitioners have been denied waivers because they made admissions regarding ignorance of the TCPA and/or FCC rules requiring them to include opt-out notices on faxes sent to recipients who provided prior express consent. See, *e.g.*, November 2015 Order at ¶21. Precise Payroll has not made such an admission in this Petition.

Rather, Precise Payroll references the general confusion regarding the opt-out notice requirement for solicited faxes, similar to all petitioners previously granted waivers; provides no admission of ignorance of the law; and, sets forth no evidence demonstrating that Precise Payroll otherwise understood they were required to comply with the opt-out notice for solicited faxes and failed to do so.

The FCC has confirmed that petitioners are entitled to a presumption of confusion when seeking a limited retroactive waiver of 47 C.F.R. § 64.1200(a)(4)(iv) for

solicited faxes. See *August 2015 Order* at ¶ 15 and *November 2016 Order* at ¶ 21. To rebut the applicable presumption, Goebel Insurance must point to some evidence that Precise Payroll was completely ignorant of the opt-out requirements, or that it understood the opt-out requirements but failed to comply. Additionally, the FCC has confirmed that it does “not require petitioners to plead specific, detailed grounds for individual confusion, and ... cannot impose that requirement now.” See *December 2015 Order* at ¶ 17.

## VII. CONCLUSION

For the foregoing reasons, Precise Payroll respectfully requests that the Commission grant a retroactive waiver from the provisions of 47 C.F.R. § 64.1200(a)(4)(iv) for facsimiles sent by or on behalf of Precise Payroll, prior to the April 30, 2015 deadline imposed by the *2014 Anda Commission Order*, affording the same relief previously granted by the Commission and the Bureau to more than 150 similarly-situated petitioners.

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